AMARAPATHI PERIASAMY

v.

MUNIANDY PERIASAMY

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-561-2004]
22 FEBRUARY 2005

FAMILY LAW: *Children - Custody - Application for interim custody by a relative of the child - Welfare of the child - Failure to provide welfare reports - Whether plaintiff aunt able to prove a superior right of custody to the exclusion of child's natural father*

This was an application by the plaintiff/aunt for the interim custody of the child. The facts were that on 6 May 1994 the defendant, who was the plaintiff's brother, and his wife had entrusted the child to the plaintiff and the latter had looked after the physical and mental health of the child. The child is now a primary school student and has been described as active and intelligent. The plaintiff alleged that the child's parents had seldom contacted her, and the child's expenses had all been paid by the plaintiff.

However, on 10 November 2004, the plaintiff, her husband and the child had visited the defendant and had stayed until 18 November 2004 when the defendant requested the plaintiff to leave the child with the defendant and had promised to return her. But when the defendant failed to do so, the child contacted the plaintiff a few days later and complained that she was allegedly scolded, assaulted and confined by the defendant. The child had even threatened that she would attempt to run away if the plaintiff did not come and get her.

The plaintiff had made an application to the welfare department for a report to be used as an exhibit. She averred that it was in the best interest for the child to be returned to the plaintiff. She prayed for the court to order the defendant to surrender the child to her and that she had been playing the role of guardian to the child and so should continue to have custody and guardianship. She did not dispute the fact that although she was the custodian of the child, the defendant was the natural father. The plaintiff had not obtained an adoption order in relation to the child.

Held (dismissing the application):

[1] In so far as ss. 2, 3, 5 and 11 of the Guardianship of Infants Act 1961 are concerned, the rights and authority are vested in the infant's mother and father and not, for example, an aunt. (p 143 a)

[2] While the plaintiff had alluded to the proposed production of the welfare reports for the respective families and the child, no such report was produced by the plaintiff for the court's consideration. (p 146 c)

[3] The plaintiff, as an aunt, had not made out a case that she had a more superior right of custody and guardianship in relation to the child, to the exclusion of the child's natural father. (p 146 d-e)

Case(s) referred to:

AL Annamalai & Anor v. Chandrasekaran Thangavelu (Unreported) (Melaka High Court OS 24-30-1989) ***(refd)***
Arumugam Seenivasagam v. Sinnamah [1959] 25 MLJ 130 ***(refd)***
Chuah Thye Peng & Anor v. Kuan Huah Oong [1978] 2 MLJ 217 ***(refd)***
Helen Ho Quee Neo v. Lim Pui Heng [1974] 2 MLJ 51 ***(refd)***
Khoo Cheng Nee v. Lubin Chiew Pau Sing [1996] 4 MLJ 171 ***(refd)***
Loh Kon Fah v. Lee Moy Lan [1976] 2 MLJ 199 ***(refd)***
Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189 ***(refd)***
Masam v. Salina Saropa & Anor [1974] 2 MLJ 59 ***(refd)***
Re Baby M (an infant) (adoption: consent) [1994] 2 MLJ 635 ***(refd)***
Re TSY (An Infant) [1988] 3 MLJ 43 ***(refd)***
T v. O [1993] 1 MLJ 168 ***(refd)***
W v. H [1987] 2 MLJ 235 ***(refd)***

Legislation referred to:

Adoption Act 1952, s. 5(1)(c)
Courts of Judicature Act 1964, s. 24(d)
Federal Constitution, art. 5(2)
Guardianship of Infants Act 1961, ss. 2, 3, 5, 10, 11
Law Reform (Marriage and Divorce) Act 1976, s. 88
Rules of the High Court 1980, O. 29, O. 84

Other source(s) referred to:

Malaysian High Court Practice, 1998 Desk Edition, vol 1, p 1327, para 29.1.3

For the plaintiff - AB Ng; M/s AB Ng & Assoc
Defendant in person

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application

Before me is enclosure (1) by way of originating summons filed by the plaintiff pursuant to ss. 2, 3 and 11 of the Guardianship of Infants Act 1961, O. 29 and O. 84 of the Rules of the High Court 1980 and s. 24(d) of the Courts of Judicature Act 1964 for the following orders:

1. That the plaintiff be given interim custody of the child named Lishalini a/p Muniandy ("the child");
2. That the defendant surrender his daughter, the child, to the plaintiff;
3. That the defendant be given reasonable access to the child;
4. That the place and time of access be arranged and agreed by the parties without interfering with the education of the child;
5. That the child be allowed to continue with her education in the Sacred Heart Primary School, Bandar Hilir, Melaka;
6. Costs be paid by the defendant; and
7. Such other relief deemed fit and proper by this court.

Factual Background

The plaintiff, the defendant's sister, is a full time housewife, who was married to one Subramaniam a/l Ellappan on 4 July 1990 but they have yet to be blessed with any child of the marriage.

On 6 May 1994 at about 3pm, the defendant and his wife entrusted the child together with the health and birth certificates to the plaintiff and her husband at the toll plaza at Sg Lalang Interchange Kedah.

The plaintiff had looked after the physical and mental health of the child who was brought up at No. 4, Lorong Bukit Setongkol 30, Taman Cenderawasih Indah Baru 25200 Kuantan Pahang where the plaintiff's husband was working as the chief enforcement officer of the Veterinary Department from 1989 to 2001 with a monthly income of RM2,442 while the plaintiff is a private tutor earning about RM1,800 per month.

They have shown their love and affection on the child. When the child was five to six years old, the plaintiff sent the child to the Methodist Kindergarten in Kuantan. In 2001, the child received her education in the Methodist (Girls) Primary School in Kuantan, and in 2002, the child studied in the Sacred Heart Primary School, Bandar Hilir Melaka, as the plaintiff's husband had been posted to the Veterinary Department in Melaka.

The child is active, intelligent and bright in her studies and was appointed a prefect for the 2005 session.

The plaintiff alleged that when the child was with the plaintiff, the child's parents seldom contacted the child, and the plaintiff had paid for the child's expenses, while the defendant earned only RM800 per month as a bread seller and had three other children in his family.

On 10 November 2004, at about 2am, the plaintiff and her husband together with the child had during Deepavali visited the defendant at No. 38-D, Taman Bahagia, 0600 Jitra, Kedah and stayed there until 18 November 2004 when the defendant requested the plaintiff to leave the child with the defendant who promised to return the child to Melaka two or three days later, but the defendant had failed to do so.

On 25 November 2004 at about 5am, the child contacted the plaintiff five to six times by using a relative's mobile telephone No. 013-9383857, requesting the plaintiff to take the child from the defendant, or else the child would attempt to run away. The child was allegedly scolded, assaulted and confined by the defendant, as a result of which the plaintiff, accompanied by her parents, went to the defendant's house in order to take the child away, but was prevented by the defendant who informed the plaintiff that the defendant had lodged a police report alleging that the plaintiff had wanted to kidnap the child. The plaintiff pleaded with the defendant to allow her to meet and speak to the child but the defendant had instead chased the plaintiff away.

Meanwhile, the plaintiff and her uncle had lodged a report at the police station Jitra, hoping that the defendant would return the child to the plaintiff but the defendant did not do so.

The plaintiff had made an application to the Welfare Department in Alor Star for a report, apparently to be used as an exhibit.

The plaintiff averred that the child's ambition is to become a cardiologist and it is in the best interest for the child to be returned to the plaintiff. The plaintiff did not dispute the fact that although she has been a "penjaga" ie, care-taker or custodian of the child, the defendant is the natural father. The plaintiff has not obtained an adoption order in relation to the child.

Custody And Guardianship

In supporting this application, learned counsel Mr AB Ng, contended that the plaintiff has been playing the role of a custodian and guardian to the child and so should continue to have custody and guardianship. Reference was made to *T v. O* [1993] 1 MLJ 168; *Helen Ho Quee Neo v. Lim Pui Heng* [1974] 2 MLJ 51; ss. 3, 5 and 11 of the Guardianship of Infants Act 1961, s. 88 of the Law Reform (Marriage and Divorce) Act 1976; *Masam v. Salina Saropa & Anor.* [1974] 2 MLJ 59; *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189; *Chuah Thye Peng & Anor. v. Kuan Huah Oong* [1978] 2 MLJ 217; *Khoo Cheng Nee v. Lubin Chiew Pau Sing* [1996] 4 MLJ 171; *Loh Kon Fah v. Lee Moy Lan* [1976] 2 MLJ 199; *W v. H* [1987] 2 MLJ 235; *Re Baby M (an infant) (adoption: consent)* [1994] 2 MLJ 635; *Re TSY (An Infant)* [1988] 3 MLJ 43; *Arumugam s/o Seenivasagam v. Sinnamah (f)* [1959] 25 MLJ 130; *AL Annamalai & Anor v Chandrasekaran a/l Thangavelu & Anor* (Unreported) Melaka High Court OS 24-30-1999.

It was also argued for the plaintiff that this is an exceptional situation under s. 88 of the Law Reform (Marriage and Divorce) Act 1976 to allow the prayers sought by the plaintiff.

The defendant is unrepresented and appeared in person.

Having regard to the facts as alleged in the plaintiff's affidavits, read together with the submission presented by his counsel, I am of the view that the question for determination herein may be formulated as follows:

> Where the natural father of a child has entrusted his child to the care of the child's aunt for some 11 years without any adoption order, and the father has subsequently taken back the child in exercise of his right of custody and guardiandship over his own child, does the child's aunt acting under sections 2, 3, 5 and 11 of the Guardianship of Infants Act 1961 have a superior right of custody and guardianship of the child to the exclusion of the child's natural father?

In my judgment, it must be immediately emphasised that the facts and circumstances of the case do not reveal any matrimonial dispute, as a result of which all statutory provisions governing and authorities concerning the issue of custody and guardianship of children embroiled in matrimonial dispute are eminently irrelevant and inapplicable.

Be that as it may, I shall analyse the statutory provisions and authorities cited for the plaintiff to see how support, if any, may be derived therefrom.

In *T v. O, supra*, a child was born to the plaintiff T. The defendant O was named as the father in the birth certificate. The parties celebrated a Chinese customary marriage. Subsequently T left the home in which they had been living together, and applied under s. 10 of the Guardianship of Infants Act 1961 ("the 1961 Act") for, *inter alia*, custody and guardianship of the child. The defendant O raised a preliminary objection on the ground that the court had no jurisdiction to hear the application as the child was illegitimate and the 1961 Act does not apply to illegitimate children. Mahadev Shankar J (later JCA) dismissed the objection.

It is abundantly clear that the sole issue in *T v. O, supra*, was one of jurisdiction and with respect, there was no other issue raised for determination therein. Further, it was made clear by the learned judge that custody applications can be made by either parent in appropriate circumstances. There was no reference to any application by an aunt of the child.

In *Helen Ho Quee Neo, supra*, both the Singapore High Court and Court of Appeal had been urged to decide on the issue of custody of a child of the marriage in a matrimonial dispute arising from a divorce petition, which is not to be the case before me.

Section 3 of the 1961 Act provides for the duties of the guardian of an infant to have custody of the infant, and be responsible for his support, health and education. Since the 1961 Act does not define the word "guardian", s. 3 has to be read together with other sections therein, and s. 5 thereof is of special significance in that it provides for the equality of parental rights, where relevant, in the following words:

5. Equality of parental rights

(1) In relation to the custody and upbringing of an infant … a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of the mother and father shall be equal.

(2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

Section 11 of the 1961 Act requires the court or a judge, in exercising the powers conferred by the Act, to have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

Hence, in so far as ss. 2, 3, 5 and 11 of the 1961 Act are concerned, the rights and authority are vested in the infant's mother and father and not eg, an aunt.

In relation to the Law Reform (Marriage and Divorce) Act 1976, it is axiomatic that it has been enacted to provide for the law relating to divorce and matrimonial proceedings, including ancillary relief such as the custody and protection of a "child" which has been defined as "child of the marriage" under the age of 18 years: see s. 2 thereof. Section 88 thereof confers upon the court to make an order for custody, where relevant, as follows:

88. Power to make order for custody

(1) The court may at any time by order place a child in the custody of his or her father, or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child …

(2) In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:

(a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express an independent opinion.

In my view, s. 88 applies only where the parents of the child have commenced matrimonial proceedings including a prayer for an order for custody of a child of their marriage under the 1976 Act. However, the instant proceedings do not concern any matrimonial proceedings based on any matrimonial dispute. In the circumstances, I do not see how the facts of the instant application would fall under s. 88.

The subject matter of the dispute in *Masam, supra*, was an illegitimate child who was given away by the unmarried mother when the child was nine days old, being born on 28 August 1970. The mother was legally married in 1972 and wished to take the child to Australia with her husband, an Australian resident. The mother commenced proceedings praying for the custody of the child in the then district court of Kuching which after a full trial made findings of fact dependent on its having seen the witness and assessed the reliability of their evidence. The district court was satisfied that the mother had never shown and had never had the slightest interest in the infant and hence dismissed the mother's claim. On appeal to the Kuching High Court, B.T.H.

Lee J (as he then was) affirmed the decision, on the basis of the welfare of the infant as the first and paramount consideration, adding that every case must plainly be determined upon the peculiar circumstances affecting that case, eg, at p. 60G left column, the learned judge made it clear that it was not possible to forecast with any certainty what the future would hold for the child in Australia, being a completely alien environment.

The facts there are obviously distinguishable in that the child in the case before me is presently staying with her natural parents in Alor Star and is not to be taken to a foreign country.

In *Mahabir, supra*, the dispute concerning the custody of two children of the marriage arose between the parents of the child, unlike the instant case in which the dispute was between the natural father and the aunt of the child.

The disputed claim for custody of the child in *Chuan Thye Peng, supra*, arose between the child's paternal grandparents and the maternal grandmother, unlike the instant claim in which the dispute revolved around the child's natural father and aunt.

In *Khoo Cheng Nee, supra*, matrimonial proceedings were commenced by the petitioner for dissolution of marriage which included a prayer for custody of two children of the marriage and so there is no nexus between that case and the instant application which involved no matrimonial proceedings.

Again, in *Loh Kon Fah, supra*, and *W v. H, supra*, the disputed custody of the children was also between parties to the marriage.

Arumugam s/o Seenivasagam, supra, was a case decided under the common law and equity and not under ss. 2, 3, 5 and 11 of the 1961 Act on which the plaintiff had relied.

Adoption

As the plaintiff has not obtained any adoption order in relation to the child, the authorities revolving around the issue of an adoption or an adoption order are in my view of no assistance or relevance to the plaintiff's case.

The issue in *Re Baby M (an infant) supra*; and *Re TSY (An Infant) supra*, concern the validity of the consent given by the natural parents of the infant M; alternatively the power of the court to dispense with the requirement of consent under s. 5(1)(c) of the Adoption Act 1952.

I shall now embark on a more detailed discussion of the final authority cited for the plaintiff ie, *A.L. Annamalai, supra,* where the child's natural parents had left the care of the child to the child's grandmother for six months, after which the grandmother left for India and the natural parents brought the child to "the adopted parents" to nurture and to take care of the child born in 1991 together with the birth certificate. The natural mother had conceded that "the adopted parents" had been the child's "guardian and foster parents since 1992" and supported any decision taken by "the adopted parents" regarding the child's education and overall well being.

The natural parents were beset by marital problems, but six years and seven months later the natural mother appeared for reconciliation with her husband on condition that the child was to be returned to their folds, but the child refused to follow. In the face of bad blood and deteriorating relationship between the families of the natural parents and "the adopted parents", the natural parents filed an originating summons praying for a writ of *habeas corpus* alleging that the child was being detained against the natural mother's will. "The adopted parents" filed an adoption action praying for the child's legal adoption pursuant to the Adoption Act 1952. By consent, the adoption action was heard first and the decision thereon would be binding on the writ of *habeas corpus*.

Suriyadi J interviewed the child who explained why she was happy with "the adopted parents" and that love oozed from them. A welfare report on each of the two family units *viz.* the natural parents and "the adopted parents" where detailed background information had been profferred for consideration by the learned judge for the purposes of the adoption action, to which the Adoption Act 1952 applies. The tenor of the well considered judgment revolved around the principles governing adoption. The learned judge held that an adoption was in the best interest of the child and made an adoption order in favour of "the adopted parents".

In relation to the writ for *habeas corpus*, it was the learned judge's finding that the child had not been detained as construed in the accepted and physical sense under art. 5(2) of the Federal Constitution, and that the child was never unlawfully detained. Hence the *habeas corpus* application was dismissed.

The two types of proceedings *viz.* adoption application and *habeas corpus* application before the learned judge in *Annamalai, supra,* are not of the same genesis as the application before me, and the principles of law applicable there and here are entirely different.

Mandatory Injunction

Although the nature of the order sought by the plaintiff especially prayer 2 above is in effect a mandatory injunction, I am unable to identify any submission for the plaintiff to support the application for this equitable relief. It is trite law that the court would only grant such an injunction sparingly ie, where a strong case for its grant has been made out: see *Malaysian High Court Practice* 1998 Desk Edition, vol. I p. 1327 para 29.1.3 and the authorities cited therein.

Welfare Report

It was implored for the plaintiff that the welfare of the child should be considered by the court. However, while the plaintiff's learned counsel had alluded to the proposed production of the welfare reports for the respective families and the child, I have not been able to find any such report. Indeed, no such report has ever been produced by the plaintiff for my consideration.

Conclusion

Having anxiously considered all the facts and circumstances made available in this court and the absence of the relevant welfare reports, I am of the view that the plaintiff as an aunt has not made out a case that she has a more superior right of custody and guardianship in relation to the child, to the exclusion of the child's natural father. I therefore answer the above question for determination in the negative, with the result that the plaintiff's application is dismissed with costs.